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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHEN QIU, Defendant and Appellant.	B288609 (Los Angeles County Super. Ct. No. KA115319)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Bruce F. Marrs, Judge. Affirmed.

Aurora Elizabeth Bewicke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Chen Qiu guilty of making criminal threats to his girlfriend (the victim), injuring her, and assaulting her with a firearm. On appeal, he contends his trial counsel rendered ineffective assistance during jury selection by not inquiring about race or gender bias. He also argues that the trial court's admission of certain extrajudicial statements made by the victim to a deputy in English and through an interpreter violated the prohibition against hearsay and his confrontation rights. Finally, defendant contends the trial court erred by imposing certain fines and fees without a prior determination that he had an ability to pay.

We hold that defendant has failed to demonstrate that his trial counsel's performance during jury selection was deficient. We further hold that defendant forfeited his challenge to the admission of the victim's extrajudicial statements by failing to object to them in the trial court, including to those statements made through an interpreter, and that defendant has not demonstrated that his counsel's failure to object to the admission of those statements was deficient. And, we conclude defendant has forfeited his challenges to the imposition of fines and fees. We therefore affirm the judgment.

II. FACTUAL BACKGROUND

A. *Prosecution's Case*

1. Deputy Acuna's Interview in English

On April 26, 2017, Los Angeles County Sheriff's Deputy Christopher Acuna was working at the Walnut Sheriff's station. The victim came into the lobby of the station at around 10:20 p.m. and stated in English that her boyfriend wanted to kill her. She was dressed in pajamas, and appeared "visibly shaken" and "very scared." She kept saying in English that her boyfriend, defendant, "wanted to kill her," and although "there was a language barrier," the deputy clearly understood "that she believed that she was in danger for her life."

During the ensuing 20-minute interview in English, the victim told Deputy Acuna that defendant came home shortly after 9:00 p.m., went upstairs, and discovered that the victim "had destroyed a bunch of marijuana plants that belonged to him." The victim "could tell that [defendant had] been drinking. And she heard him yell [that he was] going to torture [the victim] and kill [her]." The victim also told Deputy Acuna that defendant had previously tried to kill her.

2. Translated Interview

Once Deputy Acuna finished interviewing the victim in English, he called a Mandarin interpreter employed by the County (county interpreter) to help him "get a better statement and get the full story from [the victim]." The translated

interview was recorded and played for the jury. The recording included the voices of Deputy Acuna, the victim, and the county interpreter. The jury was also initially provided with a transcript of the interview, exhibit 9A, which included a different Mandarin language interpreter (certified interpreter's) translation of the victim's statements, as well as the county interpreter's contemporaneous translation of the victim's statement. Later, exhibit 9A was replaced with exhibit 9B, which excluded the certified interpreter's translations.

Through the county interpreter, the victim told Deputy Acuna that she and defendant had been together for four years and that defendant spoke only Chinese. The victim also explained that every time defendant drank, he "beat [her] up."

The victim related through the county interpreter that she drove to the Walnut station on the night of April 26, 2017, because defendant was drinking. That night, defendant threatened to kill her and her son. She feared that defendant—who used "meth"—would drug her and make her death look like an overdose, even though she did not use drugs.[1] Defendant did not threaten to shoot the victim on the night of April 26; he just threatened to torture and kill her without saying "how he [was] going to kill [her]."

The victim also described for Deputy Acuna, through the county interpreter, an incident that occurred two months earlier, at the end of January or February 2017, during which defendant

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[1] The victim believed defendant had drugged her before because after she drank some water one night, she became unaware "that whole night." She believed she must have been "out" because defendant later showed her "a naked picture of [her] and things like that."

beat the victim, broke her ribs, and scarred her face. She "had to wait a few days before [she] could go to the hospital because [she] couldn't move." She kept a shirt from that night that was still covered in blood.

When Deputy Acuna asked if defendant had ever shot at her, the victim said that he had. In August or September 2016, defendant, who had been smoking marijuana, engaged in an argument with the victim. "[A]ll of a sudden [defendant] just . . . pulled the gun out."[2] As the victim began to run to the garage, defendant shot at her, hitting the dining room wall.[3] She ran out of the partially open garage door.

3. Deputy Acuna's Search of the Home

The morning after he interviewed the victim, Deputy Acuna went to the house the victim shared with defendant to conduct an investigation. Because the victim had given the deputy permission to search her home for a handgun and a bloody shirt, he entered the unlocked front door and looked for a gun and the bullet hole in the wall described by the victim. Based on the victim's statement that defendant usually kept his

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[2] The victim had seen defendant hide a gun near the computer and, later, underneath a pillow.

[3] The victim said that "you [could] see . . . a gun hole at home" and that defendant used a hammer to remove the bullet from the wall.

gun in the couch, the deputy checked that location and found the gun behind some pillows.[4]

Because the victim also told Deputy Acuna that the round defendant fired at her struck the wall directly behind her and that defendant subsequently covered the damage from the bullet with a picture, the deputy located the picture, removed it, and observed silver tape. When he removed the tape, he saw a hole consistent with a bullet hole. Deputy Acuna also discovered marijuana plants in one of the bedrooms in the home, but did not recover a bloody shirt.

4. The Victim's Trial Testimony

The victim testified at trial that she had been dating defendant for five years and lived with him from August 2016 to May 2017. The victim was still in love with defendant and hoped that they would resume their relationship and marry.

When asked about the event that occurred between August and September 2016, the victim claimed she did not remember. Similarly, when asked about information she had provided to Deputy Acuna about the event, the victim also claimed she did not remember. The victim denied that defendant had grabbed a gun and shot at her, claiming instead that the gun discharged accidentally. She further stated that the hole in the wall of her home was caused by their attempts to hang a picture, not a bullet. She denied telling Deputy Acuna that defendant kept his

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[4] The victim stated that defendant previously kept the gun under "the pillow," but did not state that he kept it in the couch. The gun, a Glock 17, was in working order, loaded, and had a chambered round.

gun behind pillows on the couch or that defendant hung a picture on the wall to hide a bullet hole.

Regarding the January or February 2017 incident, the victim denied that defendant beat her that night, and she did not remember telling Deputy Acuna that defendant beat her the entire night. She also did not remember telling the deputy that defendant broke her ribs.

As for the April 26, 2017, incident, the victim claimed she went to the Sheriff's station that night because she destroyed marijuana plants defendant was growing in the home and acted "out of fear for his argument with me." She was angry with defendant that evening because he disturbed her on-line Bible study with church friends. She did not remember telling Deputy Acuna that night that defendant threatened to kill her or that she was afraid he would kill her because he had shot at her in the past. She denied telling the deputy that defendant had threatened to torture and kill her, and she further denied telling the deputy that she was afraid defendant would kill her if she had him arrested or that she was scared that night because defendant had threatened to beat up her son.

On cross-examination, the victim explained that in May 2017, when defendant first came to court, she told the district attorney that she had lied to the police and wanted to clarify what happened on April 26. In addition, she wrote a letter to the trial court in June 2017.

The victim reiterated that she did not remember what she told Deputy Acuna on April 26, 2017, and she also did not remember what she told the deputy about the August 2016 incident. Moreover, she denied telling Deputy Acuna that she kept the bloody shirt from the January 2017 assault. According

to the victim, she went to the doctor during that time frame because she fell. She claimed the scar on her face was from a car accident and that the accident caused her memory problems.

According to the victim, she believed she may have lied to the police because she was taking medication for emotional problems and depression. The victim again denied that defendant fired a gun at her or that he ever beat her during their relationship. The victim also claimed that defendant never threatened to kill her or her son and that, in fact, he treated them very well.

B. *Defense Case*

Defendant testified as the only witness on his behalf. He denied that he ever hit or beat the victim, threatened to kill her or her son, or threatened to torture her. According to defendant, he accidently fired a gun at home one time in May or June 2016, when he was cleaning it without a magazine inserted; he did not realize that a round was chambered. The victim was not home when the gun accidentally discharged.

Defendant admitted arguing with the victim on April 26, 2017, explaining that he was dining out with some friends when, around 10:00 p.m., he received a call from the victim advising that she had "destroyed the baby [marijuana] plants [he] grew at home." He came home, went upstairs, and saw that she had destroyed the plants that he was licensed to grow. He came downstairs and spoke to the victim for less than a minute, at which point she "grabbed her car key and purse and . . . went outside."

Defendant maintained that it was the victim who "used . . . domestic violence against [him]." At least three people witnessed the violence during which the victim "beat [defendant] so hard . . . [he] lost [his] hearing." Based on defendant's experience and relationship with the victim, he knew that she had "a tendency to exaggerate," and he explained that she "became . . . emotional about the argument[] that [they had]."

On cross-examination, defendant admitted that he owned a gun for "four to five years" and that he kept it on his couch "for a long time." He also admitted that he accidentally discharged the gun twice inside the home, but that the victim was only aware of one such incident.

Defendant explained that he punched a hole in the wall with a hammer in an attempt to disguise a bullet hole. Because the victim was concerned the landlord would evict them, defendant hung a picture over the damaged portion of the wall.

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant in count 1 with making criminal threats in violation of Penal Code[5] section 422; in count 2 with injury to a cohabitant or girlfriend in violation of section 273.5, subdivision (a); and in count 3 with assault with a firearm in violation of section 245, subdivision (a)(2). The District Attorney alleged, as to count 3, that in the commission of that offense, defendant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a).

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[5] All further statutory references are to the Penal Code unless otherwise indicated.

The jury found defendant guilty on all three charges and found the personal use of a firearm allegation true. The trial court sentenced defendant on count three to a three-year middle term sentence, plus an additional consecutive three-year term based on the personal use of a firearm allegation; on count one to a consecutive one-third the middle term sentence of eight months; and on count two to a concurrent three-year middle term sentence, for an aggregate sentence of six years, eight months. The trial court also imposed various fines and fees.

IV. DISCUSSION

A. *Ineffective Assistance of Counsel During Jury Selection*

Defendant contends that he received ineffective assistance of counsel during jury selection in violation of his Sixth Amendment right to a fair trial by an impartial jury. According to defendant, given the facts of the case and the responses of certain jurors during voir dire, his trial counsel's failure to submit questions to the trial court inquiring about racial, nationality, and gender bias, or to ask the jurors such questions herself, fell below the standard of reasonableness under prevailing professional norms.

1. Background

At the beginning of jury selection, the trial court advised the jury, among other things, to follow and accept the instructions given by the court. When the trial court asked if the jurors would follow its instructions, they responded collectively in

the affirmative. The trial court then instructed the jurors that they must decide the case based solely on the evidence. Later in the selection process, the trial court further advised the jury that "[a]n attorney, a party, or a witness may come from a particular national, racial, or religious group, or that individual may have a lifestyle that is different from your own." When the trial court asked the jurors whether "that fact [would] affect [their] judgment or the weight or *believability* [they] would give to his or her testimony," they responded collectively in the negative. (Italics added.)

During the selection process, defense counsel did not submit to the trial court, or ask on her own, any questions exploring the prospective jurors' potential racial, nationality, or gender biases. But, during questioning by the trial court and counsel, the issue of domestic violence was explored in detail, and defense counsel either moved successfully, or used peremptory challenges, to excuse several jurors whose experiences with or views on domestic violence made them potentially biased.

For example, during the trial court's questioning of the jury, prospective juror number 7695 revealed that she had "personally experienced in [her] family domestic violence," and that she therefore "might be a little biased." Under questioning by the prosecutor, the juror elaborated that she and her mother had experienced domestic violence. According to the juror, she reported the abuse to the police, but her mother did not because she was Asian and "more of a passive person" who would "not want to cause any discord in the family."[6] Juror 7695 conceded

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[6] During that line of questioning, defendant interrupted, exclaiming, "My [attorney is not] saying anything." Moreover, in addition to repeatedly requesting appointment of new counsel or

that her experience with domestic violence might affect her ability to listen to the evidence because "it might bring up . . . past memories and emotions." She did, however, agree to try to "disassociate her past experiences from what [would] happen in [the] courtroom." Defense counsel challenged juror number 7695 for cause, arguing that "[s]he was brought to tears once by me and once by the [prosecutor] when [each] inquired about the [domestic violence] issues in her family." The trial court, however, rejected counsel's for-cause challenge, prompting defense counsel to use a peremptory challenge to excuse the juror.

Prospective juror number 4846 told the trial court that she worked in "management" in China and cared for her mother there "almost like 80 percent" of the year. In response to the trial court's inquiry about her experience with criminal activity, juror number 4846—who spoke Mandarin and claimed her "English was limited"—stated that "before [her] divorce, [her] husband [hurt her] . . . ." Defendant's motion to excuse this juror was denied, but she was nevertheless excused by use of a defense peremptory challenge.

Prospective juror number 2336, a firefighter, told defense counsel that his interest in law enforcement gave him "a biased view on domestic violence." He had "heard both sides from police officers" and responded to domestic violence calls himself. In his experience, he had "only seen a male [commit domestic violence

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an order allowing him to represent himself, defendant advised the trial court that he believed his attorney was prejudiced against him because he was Chinese and she was Indian. Defense counsel informed the trial court that she was not Indian and was not prejudiced against defendant.

against] a female," which caused him to be "a little biased about the situation." According to the juror, "males [had] the upper hand when it [came] to stuff like that. Sometimes. Not all the time." Defense counsel exercised a peremptory challenge to excuse that prospective juror.

Prospective juror number 6524 told defense counsel that she had been the victim of domestic violence "back in [her] country"[7] and therefore may not be able to "vote either way," guilty or not guilty. When later asked by the prosecutor whether she could listen to the evidence and be fair despite her experience, juror number 6524 stated she was "not promising anything," but that she would try to be fair. She was subsequently excused for cause.

Prospective juror number 1065 told the trial court his son was a Ventura County Sheriff's deputy who had told him "a lot of stories" about domestic violence calls, "some of [which were] quite disturbing." When asked if he could put aside those conversations with his son, juror number 1065 said, "I would struggle. But possibly." Following the denial of defendant's challenge for cause, that juror was excused by a defense peremptory challenge.

During questioning by defense counsel, prospective juror number 2237 explained that one of her sons was currently in jail and her family had obtained a restraining order against him. The juror later explained to the prosecutor that her son had been "physical with his dad," but that the experience would not prevent her from being fair. Defendant exercised a peremptory challenge to excuse that juror.

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[7] Juror number 6524's country of origin was not disclosed during jury selection.

Following completion of jury selection, the final 12 jurors[8] and three alternates were sworn in without any objection by defense counsel to the jury as constituted. The trial court then pre-instructed the jury, including again reiterating that "[y]ou must not be influenced in your decisions by any sympathy, prejudice, or passion towards any party, witness, or attorney." And, during the jury instruction conference, defense counsel requested, and the trial court agreed to deliver, CALJIC No. 17.50, which was subsequently read to the jury and provided, in pertinent part, "Do not let bias, prejudice or public opinion influence your decision. Bias includes bias against the alleged victim or victims, witnesses or defendant based on his or her disability, gender, nationality, race or ethnicity, or sexual orientation."

Finally, during closing argument, defense counsel directly addressed the issue of ethnic or gender bias, using the voir dire of prospective juror number 7695 as an example: "When we started jury selection, we were asking you to be very candid and open about your experiences . . . . I told you that what we needed was impartial jurors and jurors that could be fair. . . . [¶] . . . [T]he reason why we do that is because there's a jury instruction that says you have to put aside any personal biases, any biases you have in regards to a person's agenda, culture, ethnicity . . . . [¶] The reason why I'm focusing on this right now is because I want to get something out of the way. And the reason why I want to deal with it is because there was a prospective juror, she was excused, and she made a comment that— [¶] And I'll be quite

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8 The parties agree that the final 12 jurors included two who had been victims of domestic violence and seven who knew someone who had been a victim of domestic violence.

honest with you. . . . As defense attorneys, sometimes we say things that just need to be said because the air needs to be cleared. And I'm gonna say it. [¶] She made a comment that her mother didn't report [domestic violence] because that's what Asian families do. . . . So let's start there. Whatever prejudices [or] stereotypes . . . you think you know about that culture, you need to put [them] aside. Because what you're supposed to focus on are the facts of this particular case."

2. Legal Principles

The principles governing a claim of ineffective assistance of counsel are well established. "A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel

had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1122.)

"A claim of ineffective assistance will not be accepted on direct appeal unless the appellate record makes clear that the challenged act or omission was a mistake beyond the range of reasonable competence. (E.g., *People v. Wilson* (1992) 3 Cal.4th 926, 936 . . . ; *People v. Pope* (1979) 23 Cal.3d 412, 426-427 . . . .) Because the [jury selection process, and specifically the] use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." (*People v. Montiel* (1993) 5 Cal.4th 887, 911.)

"The primary purpose of voir dire is to determine the competency and qualification of particular jurors to serve (Pen. Code §§ 1066-1089); the conduct of the voir dire and the qualification of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. (*People v. Duncan* (1960) 53 Cal.2d 803, 816 . . . .)" (*Olde v. Superior Court* (1982) 32 Cal.3d 932, 944.) Jury selection is a matter of trial strategy, and "[m]yriad subtle nuances not reflected on the record may shape an attorney's jury selection strategy." (*People v. Hartsch* (2010) 49 Cal.4th 472, 489, fn. 16.)

3. Analysis

Based on the record before us, we cannot conclude that defense counsel's performance during jury selection fell below the standard of reasonableness under prevailing professional norms because she may have had strategic reasons for her conduct during voir dire. As an initial matter, the trial court admonished the jurors to follow its instructions, and thereafter instructed them that they were to decide the case on the facts and were not to allow passion or prejudice to influence their decision. The trial court then repeated that instruction, both before and after the evidentiary phase of the trial. Thus, defense counsel may have reasonably concluded that the trial court's admonitions to the jury in this regard were sufficient to ensure that the jurors would not decide the case based on passion or prejudice. Indeed, counsel was entitled to assume the jurors would follow the trial court's instructions on those issues. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.) And defendant has cited nothing in the record of the voir dire to suggest that one or more of the empaneled jurors gave some indication that they would ignore the court's instructions and allow prejudice against defendant to influence his or her decision.

In addition, the issue before the jury was domestic violence, including criminal threats, not racial or gender discrimination. As explained above, the trial court and counsel thoroughly questioned the individual jurors generally about being victims of crimes and specifically about domestic violence. Thereafter, defense counsel excused several jurors who had personally experienced domestic violence or expressed negative attitudes toward persons who engaged in domestic violence. Given the

issues in the case and the extensive inquiry into the issue of domestic violence, defense counsel could have reasonably concluded that specific inquiry into racial or gender bias was unnecessary.

Defense counsel also requested CALJIC No. 17.50 on bias and prejudice based on gender, nationality, and race and directly addressed during argument the issue of cultural or gender stereotypes. Using juror number 7695's statement about her Asian mother's failure to report domestic violence as an example and referencing CALJIC No. 17.50, counsel urged the jurors to put aside any prejudices or stereotypes they may have concerning the propensity of Asian women not to report domestic violence. Again, given the extensive inquiry during the selection process into the respective jurors experiences with and attitudes toward domestic violence, defense counsel could have reasonably concluded that her argument concerning cultural or gender stereotypes was sufficient—when coupled with the trial court's instructions discussed above—to ensure that race, nationality, or gender biases would not influence the jury's ultimate conclusions based on the evidence.

The facts of this case do not suggest that racial or gender bias played a role in the three violent incidents against the victim. Both defendant and the victim were Asian, and it was not alleged or argued that defendant was racially prejudiced against the victim or she against him. Similarly, there was nothing in the facts of the case known to counsel at the time of voir dire that indicated that defendant assaulted and threatened to kill the victim because she was a woman. Moreover, although defendant testified that the victim had previously abused him, he did not claim he acted in self-defense on the charged date. Instead,

defendant contended that he had not abused or threatened to kill the victim. Thus, defendant's testimony did not require the jury to consider gender stereotypes in evaluating the likelihood of the victim having attacked the defendant first.

Finally, although the case turned, in part,[9] on the credibility of the victim and whether the jury would believe her extrajudicial statements to Deputy Acuna or her trial testimony, there is no indication in the record that any of the jurors would have been inclined to consider her gender or race in evaluating her credibility. Although witnesses recant prior statements for a variety of reasons, and jurors believe witnesses based on a multiplicity of factors, there was nothing about the facts of the case known to defense counsel during the selection process that would have required her to make specific inquiry into whether jurors would believe or disbelieve either the victim or defendant based solely on gender or nationality.

Based on the record before us, we cannot conclude that defense counsel's performance during jury selection fell below an objective standard of reasonableness.[10]

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[9] Because defendant was argumentative during trial in the presence of the jury and testified evasively and inconsistently at times, his own demeanor and testimony may well have been a substantial factor in the jury's determination.

[10] Defendant contends that his counsel was ineffective for failing to object to the jury as finally constituted because counsel thereby failed to preserve a claim of error in the denial of a challenge for cause. Defendant's argument is without merit because defendant does not challenge on appeal any of the court's for cause rulings. (*People v. Millwee* (1998) 18 Cal.4th 96, 146 ["To preserve a claim of error on the denial of a challenge for

B. *Admission of Extrajudicial Statements*

Defendant contends that the trial court erred when it admitted the victim's extrajudicial statements to Deputy Acuna in English because those statements were testimonial and therefore inadmissible under the confrontation clause. Defendant further contends that the trial court erred when it admitted the victim's statements to Deputy Acuna, as made through the county interpreter, because those statements were inadmissible "hearsay-within-hearsay" and, in any event, inadmissible under the confrontation clause because the county interpreter was not available to be cross-examined as to her qualifications and impartiality.

1. Background

Prior to trial, the prosecutor submitted a trial brief informing the trial court that because the victim had been uncooperative at the preliminary hearing, the prosecutor expected her to be uncooperative at trial. The prosecutor therefore informed the court that she intended to play the victim's recorded interview with Deputy Acuna at trial. During a pretrial conference, the trial court indicated that if an uncooperative victim had made prior statements that were inconsistent with those made in court, the prosecution would ordinarily be allowed to introduce those statements. Defense counsel agreed generally with the trial court's interpretation of

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cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted"].)

the law, but reserved any objection until she heard the victim's testimony.

At trial, defense counsel objected that the transcript of the deputy's recorded interview with the victim was inaccurate. In response, the trial court assured counsel that it would instruct the jury that the transcript was not evidence, and that they were to consider as evidence only the recording itself. Defense counsel renewed this objection on two subsequent occasions, and the trial court again assured her that it would remind, and in fact had reminded, the jury that the transcript was not evidence.

During trial, when the prosecutor asked Deputy Acuna what the victim told him during his interview of her in English, defense counsel objected on hearsay grounds. The trial court overruled the objection, noting that the statements were "prior consistent, prior inconsistent statements." Deputy Acuna thereafter testified about what the victim told him during his interview of her in English. The prosecution then played without further objection the recording of the deputy's interview of the victim through the county interpreter.

At no point, however, did defense counsel object to the admission of the victim's prior statements to Deputy Acuna in English on the ground that it violated his confrontation rights. And, defense counsel did not make either hearsay or confrontation clause objections to the victim's statements to the deputy made through the county interpreter.

2. Forfeiture

The Attorney General argues, among other things, that defendant forfeited his confrontation clause challenge to the

victim's extrajudicial statements to Deputy Acuna in English by failing to object on those grounds in the trial court. Similarly, the Attorney General argues that defendant's "hearsay-within-hearsay" and confrontation clause challenges to the victim's extrajudicial statements made through the county interpreter were forfeited by failing to object on those specific grounds. Defendant counters that his counsel's hearsay objection to the victim's out of court statements in English was sufficient to preserve his confrontation clause objections and that, to the extent he forfeited his challenges to the admission of the victim's extrajudicial statements, he received ineffective assistance of counsel.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. [Citations.] As the United States Supreme Court recognized in *United States v. Olano*, [(1993)] 507 U.S. [725,] 731, '"[n]o procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."' [Citations.] 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.)

We agree that defendant's challenge to the admission of the victim's statements to Deputy Acuna in English on the grounds that such admission violated his confrontation rights was forfeited on appeal based on his failure to object on those grounds in the trial court. (See *People v. Rangel* (2016) 62 Cal.4th 1192,

1217 [An objection based on *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and the confrontation clause "generally requires a court to consider whether statements are testimonial, and, if so, whether a witness was unavailable and the defendant had a prior opportunity for cross-examination. This invokes different legal standards than, for example, a hearsay objection, which generally requires a court to consider whether the foundational requirements for admission of particular hearsay have been satisfied"]; *People v. Redd* (2010) 48 Cal.4th 691, 730, fn. 19 ["Defendant's objection below, . . .—that the testimony did not come within a state-law exception to the hearsay rule because it lacked an adequate foundation—presented legal issues different from those underlying an objection that the admission of testimony would violate the confrontation clause. Therefore, defendant's new objection on appeal is not merely a constitutional 'gloss' upon an objection raised below, and is forfeited"].)

For similar reasons, we conclude that defendant's "hearsay-within-hearsay" and confrontation clause challenges to the admission of the victim's statements to Deputy Acuna through the county interpreter were also forfeited, as defendant made no objection to those statements below. (*People v. Alexander* (2010) 49 Cal.4th 846, 908 [defendant forfeits challenges to hearsay and double hearsay objections by failing to raise those objections in the trial court]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 313, fn. 3 ["The right to confrontation may, of course, be waived, including by failure to object to the offending evidence"].)

3. Ineffective Assistance

Defendant contends that, to the extent his "hearsay-within-hearsay" and confrontation clause challenges have been forfeited, he received ineffective assistance of counsel. Citing *People v. Blessett* (2018) 22 Cal.App.5th 903[11] and, in his reply, *People v. Yates* (2018) 25 Cal.App.5th 474, defendant argues that failing to object on hearsay and confrontation grounds fell below an objective standard of reasonableness under prevailing professional norms. According to defendant, there could have been no strategic reason for defense counsel's failure to raise the additional layer of testimonial hearsay or the confrontation clause violation in response to the prosecutor's stated intention to play for the jury the recorded statements the victim made to Deputy Acuna through the interpreter.

a. Legal Principles

The general legal principles applicable to this claim of ineffective assistance are the same as those discussed above, including the applicable presumption that defense counsel acted within the wide range of reasonable professional assistance and the burden imposed on defendant to show that there could be no satisfactory explanation for defense counsel's failure to object. (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.) When examining an ineffective assistance claim, we defer to counsel's reasonable tactical decisions (*ibid.*), including the decision whether to object,

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11 In his reply brief, defendant notes that, following the filing of his opening brief, the Supreme Court granted review in *People v. Blessett*, *supra*, 22 Cal.App.5th 903.

which is inherently tactical and rarely the basis for an ineffective assistance claim. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Nor can we uphold a claim of ineffective assistance based on counsel's decision not to make meritless objections. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

b. Analysis

Defendant asserts that there could be no strategic reason for failing to make a confrontation clause objection to the admission of the victim's statements to Deputy Acuna in English. But, as noted above, an objection under *Crawford*, *supra*, 541 U.S. 36 and the confrontation clause requires that the witness who made the challenged out of court statements be unavailable for cross-examination at trial. Here, the victim testified at trial. Although defendant contends that the trial court impliedly found the victim to be unavailable based on her evasive answers, the record of her trial testimony shows that she testified to some facts, could not remember other facts and prior statements, and flatly denied certain other facts and prior statements. She did not, however, refuse to answer any questions. Given her testimony, defense counsel could have reasonably concluded that she was not an unavailable witness for purposes of an objection based on *Crawford* and the confrontation clause, and therefore that any such objection to the victim's English out of court statements would not be well taken. (See *People v. Foalima* (2015) 239 Cal.App.4th 1376, 1390-1391 [""[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"

[Citations.]' [Citation.] [¶] That opportunity may be denied if a witness refuses to answer questions, but it is not denied if a witness cannot remember"]; *People v. Homick* (2012) 55 Cal.4th 816, 861 ["'[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer'"].)

Similarly, there could have been a reasonable basis for defense counsel's failure to object on "hearsay-within-hearsay" grounds to the admission of the victim's statements to the deputy through the interpreter. The county interpreter's contemporaneous translations were recorded and later transcribed and interpreted by a certified interpreter as reflected in exhibit 9A. Thus, defense counsel could readily examine the accuracy of the county interpreter's contemporaneous translation. Indeed, we have reviewed exhibit 9A and it amply supports the conclusion that the county interpreter's translations were materially accurate. Moreover, the audio recording included a record of what each of the participants to the interview stated. Thus, defendant had the additional opportunity to determine, with the aid of yet a third Mandarin language interpreter, whether the county interpreter and the certified interpreter's translations were accurate, and if inaccurate, whether such inaccuracy prejudiced defendant.[12] Defense counsel may thus have concluded that the county interpreter accurately translated the victim's statements such that cross-examination of the county interpreter's qualifications and impartiality would have been fruitless, and a different interpreter would have provided the

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[12] Although defense counsel objected that the written transcript was inaccurate, she did not object that the oral translation of the county interpreter was inaccurate.

same translation. We thus cannot conclude on this record that defense counsel's failure to make a confrontation clause objection to the interpreter's statements fell below an objectively reasonable standard of care under prevailing professional norms.

C. *Ability to Pay Fines, Fees, and Assessments*

Defendant asserts that the trial court erred by imposing a $120 court operations assessment (§ 1465.8), a $90 court facilities assessment (Gov. Code, § 70373), and a $1,800 restitution fine (§ 1202.4, subd. (b)). Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157, defendant contends the trial court violated his due process rights by imposing the court operations and court facilities assessments without considering his ability to pay them. Defendant further contends that the restitution fine must be stayed until the People demonstrate he has the ability to pay. We are unpersuaded.

Unlike the defendant in *People v. Dueñas, supra*, 30 Cal.App.5th 1157, defendant did not object below on the grounds that he was unable to pay, even though the trial court ordered him to pay a restitution fine in excess of the minimum.[13] Section 1202.4, subdivision (c) provides that a trial court may consider inability to pay when "increasing the amount of the restitution fine in excess of the minimum fine . . . ." Our Supreme Court has held that a defendant forfeits a challenge to the trial court's imposition of a $10,000 restitution fine for failing to consider his ability to pay if the defendant did not object below. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)

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[13] Pursuant to section 1202.4, subdivision (b)(1), $300 is the minimum fine for felony convictions.

Defendant concedes that his trial counsel failed to object to the assessments or the restitution fine at sentencing. We conclude that on these facts, defendant forfeited his challenge to the penalty assessments. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 [finding that defendant who failed to challenge assessments and maximum restitution fine at sentencing had forfeited his argument on appeal].)

IV. DISPOSITION

The judgment of the trial court is affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.